

**MINUTES**

**MONTANA SENATE  
56th LEGISLATURE - REGULAR SESSION**

**SUBCOMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY  
SB 322**

**Call to Order:** By **CHAIRMAN FRED THOMAS**, on February 19, 1999 at 11:40 A.M., in Room 405 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Fred Thomas, Chairman (R)  
Sen. Duane Grimes, Vice Chairman (R)  
Sen. Chris Christiaens (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Susan Fox, Legislative Branch  
Martha McGee, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Subcommittee meeting & Date(s) Posted: SB 322, 2/15/1999  
Executive Action: None.

**SUBCOMMITTEE MEETING ON SB 322**

**Sponsor:** SEN. MIGNON D. WATERMAN, SD 26, Helena

**CHAIRMAN FRED THOMAS** called the Subcommittee meeting to order and asked **SEN. MIGNON WATERMAN** to start by explaining the bill.

**Opening Statement by Sponsor:**

**SENATOR MIGNON WATERMAN** stated there are several sets of amendments to be walked through. The morning after the hearing, she met with **Susan Witte** from Blue Cross, **Chris Tweeten, Office of the Attorney General**, and **Susan Fox** to go over what had been

discussed and the issues they could agree on. They are encompassed in the amendments she presented. She tried to keep the **Montana Higher Education Student Assistance Corporation (MHESAC)** non-profit issue out of this. It was something that came out later and something the committee needs to decide if they want included.

**SENATOR CHRISTIANS** stated he is not sure which amendments we are talking about.

**SUSAN FOX** reviewed the amendments from her overview as per **EXHIBIT (phs41b01)**. She stated **EXHIBIT (phs41b02)** amendments **SB032201.asf** were originally done by **Chris Tweeten** to address issues raised by other entities and were circulated prior to the hearing.

**EXHIBIT (phs41b03)** Amendments **SB032202.asf** addressed whether Blue Cross/Blue Shield was covered by the bill and whether it was a mutual benefit or public benefit. This bill includes mutual benefit corporation in the definition of non-profit and rearranges the bill so it makes more sense. These amendments assure the fact Blue Cross/Blue Shield would be covered by the bill.

Amendments **SB032203.asf** is the first set of the **MHESAC** amendments which are not in the packet.

**EXHIBIT (phs41b04)** Amendments **SB032205.asf** is the next iteration of the **MHESAC** amendment. There are additional changes forthcoming on this set.

**EXHIBIT (phs41b05)** Amendments **SB032204.asf** is the amendment Steve Browning brought forth for **MHA** regarding the definition of material amount.

**EXHIBIT (phs41b06)** Amendments **SB032206.asf** are the amendments **SEN. WATERMAN** alluded to of the remaining concerns after the hearing. It reiterates some of the amendments in **01** set because they were adding on or fine tuning them. Because **01** was created before the hearing they wanted to keep those issues separate that came up during the hearing.

**EXHIBIT (phs41b07)** Amendments **SB032207.asf** is in essence a substitute bill. Because that one section was already in the bill they did not have to strike the whole bill. It basically takes out all the new sections in law and deals with one single section of existing law in Title 35 or Section 13 in the bill. This applies to all three types of non-profit corporations.

**{Tape : 1; Side : A; Approx. Time Counter : 0 - 6; Comments : None. }**

**SENATOR THOMAS** asked **SEN. WATERMAN** to address her principle reason for wanting the committee to pass an act on this bill.

**SENATOR WATERMAN** stated this bill does not apply to any hospital or health care organization unless they plan to convert from a non-profit to for profit. When a non-profit makes a conversion, they have had a number of years as a non-profit where they are tax exempt and where they have accumulated assets. If they decide to convert to for profit then the public has a right to know the value of those assets and what will happen to those assets. Are they going to continue that same charitable purpose they originally intended and how will they do that or will it be converted to for profit and a totally different purpose? Through the Attorney General and through an established process, this bill allows the public an opportunity to understand what is happening to those assets and if there is a change in purpose. That is the goal and purpose of the bill.

**SENATOR GRIMES** questioned if the merger of benefits in Great Falls was to a for profit status? **SEN. WATERMAN** stated no. She does not think there is an instance in Montana. **SEN. GRIMES** questioned if the Surgicenter out of St. Pete's applied? **SEN. WATERMAN** stated it went through a review process. Also it is a for profit but as part of their operation they agree they will meet that charitable need. She believes that is one of the benefits because that could have been designed to be a for profit where a different purpose would have been used, however, the hospital insisted they continue to provide charity care. **SEN. GRIMES** questioned if they calculated how much charity care they should be or would be providing? **SEN. WATERMAN** stated that is part of that conversion and that is a reason why a process is needed to assure that is done.

**Chris Tweeten** stated in response to **SEN. GRIMES'** question, the best example is the sale of **Yellowstone Community Health Plan (YCHP)** which was a non-profit, total benefit corporation established by St. Vincent's. In the transaction that was carried out between St. Vincent's and Blue Cross/Blue Shield, 100% of the assets of **Yellowstone Community Health Plan** were transferred into a for profit stock company called New Corp. **Yellowstone Community Health Plan** (non-profit) received 100% of the stock in New Corp. in exchange for transferring all those assets. Essentially all the non-profit assets of **Y CHIP** were transferred into a for profit entity in exchange for ownership of all that stock. They then sold one-half of that stock to Blue Cross/Blue Shield. That was a conversion in the sense that all

the non-profit assets of **Y CHIP**, which were public benefit and charitable trust assets owned and controlled by **Y CHIP** and it's member St. Vincent's Hospital, became the assets of a for profit company. That is the kind of transaction that would be reviewed under this bill. They reviewed it in a limited way under the existing statute. Under this bill they would have more resources and a better structure for reviewing those kinds of transactions.

**{Tape : 1; Side : A; Approx. Time Counter : 6 - 11.5; Comments : None.}**

**SENATOR WATERMAN** stated she thinks they need to work on the definition of material and a material transfer. Also they need to relinquish control which is an important change. If that non-profit is relinquishing control to someone else for profit, then it behooves the public to know that.

**SENATOR CHRISTIAENS** questioned with the sale of **Y CHIP**, was there a change in the services they would be providing, i.e. would they no longer be providing charitable? **Mr. Tweeten** stated that is not the case with the transaction as it has been explained to him. They have no reason to believe there has been a change in services. They were told exclusively it was the intention of both Blue Cross/Blue Shield and St. Vincent's that New Corp continue to operate in essentially the same way and in pursuit of the same public benefit purposes as **Y CHIP** had in its operation. They were told there would not be a material change in the operations other than it would give them access to opportunities to raise additional capital to enroll more members and expand their business into more expansive markets to the ultimate benefit of the policy holders.

**SENATOR GRIMES** asked, essentially the community benefit had not changed? **SEN. WATERMAN** stated it was preserved. **SEN. GRIMES** stated what had changed apparently was either the inurement or the perceived inurement from the transition of a large amount of capital from a non-profit to for profit community assets change. **SEN. WATERMAN** stated clearly this has happened for hospitals and health plans in other states. Some have gone well and some have not.

**SENATOR THOMAS** asked to be walked through the review process. **Mr. Tweeten** stated it is very unstructured. They have a couple of statutes that apply. There is a statute triggered by the **Y CHIP** transaction which is Section 6-17. It is one of the sections amended in the bill and the one specifically amended in the **MHESAC** amendment. Subsection (7) of that statute says when a public benefit or religious corporation proposes to transfer all or substantially all of its assets, other than in the regular

course of business, they must give 20 days notice to the Attorney General of their action. That gives the Attorney General the opportunity to take action under the other statutory authority the Attorney General has which is to protect and enforce charitable trust. If the assets are being used inconsistent with the terms of the trust, the Attorney General can go to court and stop it.

The review process followed in **Y CHIP** is the first one, to his knowledge, to be done in the Attorney General's office. It involved a couple of informal requests for information made to the companies and they were forthcoming with the information requested. They reviewed it in-house and it was their conclusion that all appeared to be in order based on the way it was presented to them. They assumed the evaluation was appropriate and the transaction actually produced fair market value for the applicant. After reviewing the information, there was a licensing change in the HMO for **Y CHIP** which required approval from the Insurance Commissioner. There was a more formal proceeding in the Insurance Commissioner's office which culminated in a hearing held in Billings in September. The issuance of the original findings of fact included approving the transfer of the license. They completed their review in December and issued letters to **Y CHIP** early in January saying, based on the information given and certain assumptions, they felt the transaction adequately protected the public's interest in the charitable assets and as a result were not going to take action to block the transaction. It was an unstructured review.

**{Tape : 1; Side : A; Approx. Time Counter : 11.5 - 17.1; Comments : None.}**

**SENATOR THOMAS** questioned if he felt anything was done in error in the transfer? **Mr. Tweeten** stated based on the information given at the time he did not think so. They reached some conclusions with respect to the nature of the parties of the transaction, which they have now been told may not be correct after issuing their letter in January. They may be requesting more information. The uneasiness they have about this is the fact the company hired a large accounting firm to do their evaluation of the assets. They had outside counsel with experience in these transactions advising them about these things all of which cost them money. The Attorney General's Office did not have the budget to engage those kinds of experts to look over their should and advise them as to whether what they were doing was appropriate or not. They had to use the in-house resources they had. It is not a comfortable position for regulators as they do not have the opportunity to draw their own definitive conclusions.

**SENATOR GRIMES** questioned the net effect of this bill if they had been required to pre-submit information or required to do a different evaluation of the market assets or the public hearing process? What may have been the effect other than delay? **Tom Ebzery, Yellowstone County Health Plan**, stated information was requested and they submitted it in a timely fashion. They let them know approximately the same time they let the Insurance Commissioner know what they had been doing. They would have had more to do and it would have taken a lot more time and, under this bill, it would have clearly been more costly. They would not have been close to being approved by this time and he does not feel there would have been a different result. It would have put the Attorney General in the position of evaluating whether the community would benefit in Billings from that. It is a big sweep of information and for what result? He did not think the result would have been different but it is much more expensive and time consuming.

*{Tape : 1; Side : A; Approx. Time Counter : 17.1 - 21.5; Comments : None.}*

**SENATOR GRIMES** asked if they could philosophically discuss the issue of public benefit versus sound business decision making and efficiency of decision making within a conversion effort. **Mr. Ebzery** stated they do not have any problem whatsoever in having the public view what is being done. They would not object if the Attorney General had the same authority as the Insurance Commissioner has right now. One issue has been identified since 1978 and because of that a bill has been introduced with such a wide sweep. **SEN. GRIMES** questioned if it is their philosophy that conversion should be allowed on an as needed basis as long as there is a level of public accountability? **Mr. Ebzery** stated absolutely, they had no problem with looking at that issue. He feels there is a concern. This idea got started about four years ago when Columbia HealthSystems was looking to buy their competitor in Billings as a for profit situation. In those instances, they believe they should be looked at but to pass a sweeping law that gives unlimited discretion to the Attorney General for any particular transaction that causes them concern.

**SENATOR CHRISTIANS** thinks there may some difference in the information that may already be in the Insurance Commissioners Office and the expertise to review that may not be available in the Attorney General's office. He is assuming there is a 20 day notice, the same as required for notifying the Attorney General? **Peter Funk, Auditor's Office**, stated they have a little bit different process under the Insurance Commissioner code. Essentially what occurred under their evaluation criteria is they do not have any specific language in the Montana Insurance Code

which addresses conversion. When **YCHP** and Blue Cross/Blue Shield filed an application in their office to go forward with this joiner of the two insurers, and in the public hearing process, the conversion process was raised, as **Mr. Ebzery** said, by Deaconess Hospital. It was also raised by many others in the public hearing process, not just by Deaconess. They were confronted with legal mandates to consider the issues the public had raised in the hearing process with a complete vacuum of statutory authority to act in the area of conversion. It was argued they leap into the breach on the conversion issue without any type of established process because the potential for conversion would not be in the public interest. They engaged in something similar to what the Attorney General's Office did although they did it on a much more short hand fashion. They made some decisions regarding conversions in that process.

They do have a section in the insurance code, in these types of transactions, where they can hire expert witnesses. The Attorney General's office had the authority, under existing law, to look at the alleged conversion, yet had no ability to hire outside experts. The Insurance Commissioner had some statutory language which allowed them to hire outside experts and yet nothing to tie their evaluation directly to the conversion issues. They felt very reluctant to do that in this case. From the standpoint of the legal staff, he would never recommend that the Insurance Commissioner go through this type of process again without hiring expert witnesses.

**{Tape : 1; Side : A; Approx. Time Counter : 21.5 - 29.8; Comments : None.}**

**SENATOR CHRISTIAENS** questioned if expert witnesses had been hired, who pays for that? **Mr. Funk** stated the language in the insurance code is very open ended. It essentially says they can hire outside experts and those costs can be charged to the applicants to the degree that the Commissioner needs assistance in evaluating the proposal before him.

**SENATOR CHRISTIAENS** stated with that in mind, what is different if the Attorney General had that same ability? **Mr. Ebzery** stated they are two different situations. **Mr. Funk** has already alluded to their statute which states the process for what they were going to do. If they make that decision, they would be able to trigger this procedure if they did not feel comfortable with their decision. In the instance of this bill, before any amendments are considered, it would automatically trigger a whole laundry list of powers they could have that were well beyond anything that would be envisioned in the present insurance coverage. Their initial problem with this is that it is the all

encompassing things in this bill that differ from the Insurance Commission. If the Attorney General were put in the same shoes as the Insurance Commissioner they would conduct a review and then determine whether or not it was necessary for them to hire outside consultants, not just automatically yes, that is material and the game is open and here comes the investigation an you get the bill.

**SENATOR WATERMAN** stated under the first set of amendments, it would clarify that any finding for the Insurance Commissioner or the Department of Public Health and Human Services are a finding on the Attorney General so there is not the duplication. Under the Hospital Association it tightens up the definition of material. In amendment **06**, it eliminates a number of the specific review elements Blue Cross and **Mr. Ebzery** were concerned about. They did look much like a laundry list and they will try to address their concerns by striking that section.

**Michael Becker, Blue Cross/Blue Shield**, stated he wanted to elaborate a bit more on the question of how, if passed, this bill would have an effect on a **Y CHIP** transaction. The filing requirements would be significantly different than the notice requirements under current law. They would have had to engage their outside counsel and their experts as they drafted and prepared the documentation for that filing. The fact that the statute allows unlimited hearings would have meant that not only would they have gone through the hearing in Billings with the Insurance Commissioner but they would have gone through another Attorney General hearing in Billings and perhaps one in Helena, as well, if the Attorney General sought to hold more than one hearing. It could also have gone beyond that as there is no limit to the number of hearings that are held. At least one must be held in the locality where the assets exist. Experts would have been engaged. He questioned the process of what would happen once the Attorney General engages those experts? If the Attorney General engages experts to look at the legal documents and whether parties drafted them appropriately and negotiated the transaction appropriately, then the parties to the transaction would likewise have their outside counsel looking at the work product of the Attorney General counsel reviewing the transaction for those legalities. If the Attorney General hires an expert to look at the evaluation, they won't stop the meter running on their own evaluation experts during their due diligence process. They will keep those people on the payroll through the hearing process. The dynamic of how these hearings would unfold with competitors is also something the committee needs to keep in mind. In the **Y CHIP** transaction, they were fought very hard by a competitor. It would have been very costly and time consuming had they been working under this bill.

In regard to their proposal on how to solve this problem, they understand the need for the Attorney General to look at these transactions when there is a transaction, as under current law, that involves all or substantially all of the assets of a non-profit corporation. In those instances, they have proposed the Attorney General will have 60 days notice rather than 20 days under the statute. The Attorney General will have the access to the experts he needs to hire to review the process. They believe that proposal answers the questions and concerns of the Attorney General for these transactions.

**{Tape : 1; Side : B; Approx. Time Counter : 0 - 8; Comments : None.}**

**SENATOR GRIMES** stated the philosophical issues here are significant in terms of who will make the decisions over whether or not something trips the public benefit and what is the scope of the review necessary for the public? Also to what degree do they involve the assets? There are many big issues here.

**SENATOR WATERMAN** stated using St. Peter's Hospital as an example, under the amendment Blue Cross is proposing, St. Peter's could sell off their SurgiCenter, their medical building, and their imaging center until they closed the doors and sold the last bed. That is exactly how conversions have occurred in recent months in other states. These hospitals and up care sell off parts and they are called creeping conversions. She feels if an entity is converting a material amount, we need to look at that.

**Mr. Becker** stated the Attorney General told them they believed they had the authority now to look at a conversion transaction if, in fact, a non-profit such as a hospital were to sell a SurgiCenter and inure assets to private individuals. They can look at that now. The authority exists and any time you try to aggregate non-material transactions or look at creeping conversion, you have an unworkable situation. He is not aware of any statute in any state that has a trigger that looks at those creeping conversion transactions. He does not think it is workable.

**Mr. Tweeten** stated the problem has never been authority. The Attorney General has the authority to review transactions of only \$1.00 worth of public trust assets. They do not have resources and a structure for how those transactions are to be reviewed. Just saying they have the authority does not answer the question because authority, as a practical matter, is impossible to exercise unless resources are provided to do it. The next question is should those resources be provided by the taxpayers

or should they be reviewed on a case by case basis and make the applicants pay the cost as part of the transaction.

**SENATOR THOMAS** said the committee would adjourn and meet again next week.

**SENATOR GRIMES** questioned if the next meeting would involve a detailed review of the amendments? He is ready to dig through this now issue by issue.

**SENATOR THOMAS** stated yes.

**SENATOR CHRISTIAENS** questioned what he would consider a substantial transaction? **Mr. Becker** stated he thought the trigger for the formal review with hiring experts at the parties expense should be just as it is under current law, i.e. transactions involving all or substantially all of the assets.

**SEN. CHRISTIAENS** questioned what he considered substantial? **Mr. Becker** stated substantial under IRS code is 80%.

**SENATOR THOMAS** adjourned the meeting and will set a time for meeting at a later date.

*{Tape : 1; Side : B; Approx. Time Counter : 8 - 13.5; Comments : None.}*

**ADJOURNMENT**

Adjournment: 12:25 P.M.

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SEN. DUANE GRIMES, Vice-Chairman

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MARTHA MCGEE, Secretary

AB/MM

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JYL SCHEEL, Transcriber

**EXHIBIT** (phs41bad)